

Sexual and Interpersonal
Misconduct
Investigator Training
Supplement

Presented By:

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Use of Slides

- **This PowerPoint presentation is not intended to be used as a stand-alone teaching tool.**
- **These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.**
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Terminology

Criminal/Advocacy

- Victim
- Survivor
- Perpetrator

Title IX

- **Complainant:** an individual who is reported to have experienced prohibited conduct
- **Respondent:** an individual who has been accused of prohibited conduct
- **Party:** Complainant or Respondent
- **Third Party:** an individual who is not a University student, faculty or staff member
- **Witness:** an individual who may have information relevant to a report of prohibited conduct



THE NATIONAL CENTER FOR
Victims of Crime

The Context

- Regulatory Framework
- Dynamics of Trauma regarding Sexual and Gender-Based Harassment and Violence
- Individual Culture, Climate, History, Resources, Policies, Procedure, and Personnel of Institution

The Challenge of the Context

- Criminal Defense

- Interview witnesses
- Request records
- May not choose to participate in University process
- Request defer University disciplinary proceeding

- University Report and Process

- Departments involved – Campus Safety, Athletics, Student Affairs, TIX, Housing, Human Resources
- Advisors
- Consider University policy, state law, criminal process, University policy, HIPAA, FERPA, NCAA, VAWA, Title IX
- University process

- Law Enforcement

- Interviews and/or possible arrest
- Physical evidence
- Search warrant
- Investigation
- Formal arraignment
- Pre-hearing and motions
- Trial elements with long timeframe

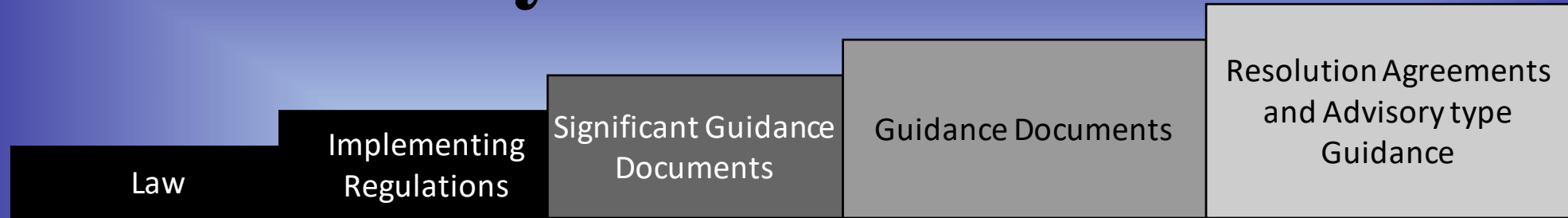
- Civil/Regulatory Actions

- Civil Discovery, Depositions, Interviews
- OCR, NCAA, Athletic Conference, DOJ

- Media Inquiries

The Regulatory Framework

The Hierarchy



- Title IX

- Title IX Implementing Regulations (2020)

- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A
- Preamble to Title IX Implementing Regulations

- 1997 Sexual Harassment Guidance
- 2001 Revised Sexual Harassment Guidance
- Dear Colleague Letters
 - Bullying
 - Hazing
 - Title IX Coordinator
 - Retaliation

- Resolution Agreements
- OCR aids and tools
- OCR webinars
- OCR blog

Federal Regulatory Framework



Title IX of the Education Amendments of 1972 and the new 2020 Title IX Regulations

- Prohibits sex discrimination in educational institutions that receive federal funds

The Jeanne Clery Act (1990)

- Requires reporting of crimes, timely warnings, education/prevention programs, and policies and procedures for sexual assault

The Violence Against Women Reauthorization Act of 2013

- Amends Clery to expand sexual assault requirements and include dating violence, domestic violence, and stalking; applies to all students and employees

Understanding Title IX

The Law:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

20 USCA Sec. 1681

Understanding Title IX

Core Tenets:

- When a school **knows or reasonably should know** of possible sexual violence, it must take **immediate** and appropriate steps to investigate or otherwise determine what occurred
- If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to
 - **Eliminate** the hostile environment
 - **Prevent** its recurrence
 - **Address** its effects
- School must protect the complainant and ensure his or her safety as necessary, including taking **interim steps** before the final outcome of any investigation

Understanding Title IX

Core Tenets:

- Requires grievance procedures for “**prompt and equitable**” resolution of student, employee, and third-party complaints;
- A school violates Title IX if it “**has notice**” of a sexually hostile environment and fails to take **immediate and effective corrective action**.
- A school has notice if a *responsible employee* knew or, in the exercise of reasonable care, should have known about the harassment.

Understanding Clery (VAWA)

- Applies to sexual assault, dating violence, domestic violence and stalking
- Applies to Clery-defined crimes reported to **campus security authorities** that occur on Clery geography
 - On campus
 - On a noncampus building or property
 - On public property
- Reporting of crime statistics through
 - Daily crime log
 - Annual security report
- Duty to warn/timely warnings

Clery on Sexual Offenses

- Educational programs to promote awareness
- Procedures students should follow if a sex offense occurs, including:
 - Reporting procedures
 - The importance of preserving evidence
- Information on law enforcement reporting options and how the University can assist
- Notifying students of existing resources and services
- Duty to warn/timely warnings (not precluded by FERPA)
- Notifying students of university accommodations after an alleged sex offense
- Develop procedures
- Same opportunities for accuser and accused during a disciplinary hearing
- Notify of outcomes
- Develop sanctions

VAWA Procedural Requirements

- The accuser and the accused have **equal opportunities to have others present**, including an **advisor of their choice**;
- Officials are **appropriately trained** and **do not have a conflict of interest** or bias for or against the accuser or the accused;
- The accuser and the accused receive **simultaneous notification**, in writing, of the result of the proceeding and any available appeal procedures;
- The proceeding is completed in a **reasonably prompt timeframe**;
- The accuser and accused are given **timely notice of meetings** at which one or the other or both may be present; and
- The accuser, the accused, and appropriate officials are **given timely and equal access to information** that will be used during **informal and formal disciplinary meetings** and hearings.

University vs. Criminal Process – Two Independent Processes

“Policies shall address procedures victims should follow if a sex offense, domestic violence, dating violence, sexual assault, or stalking has occurred, including information in writing about:

- Options regarding law enforcement and campus authorities, including notification of the victim's options:
- Notify proper law enforcement authorities, including on-campus and local police;
- Be assisted by campus authorities in notifying law enforcement authorities **if the victim so chooses**; and
- **Decline to notify the authorities”**

Courts on Due Process and Fundamental Fairness

- ***Doe. Rectors and Visitors of GMU (2016)***: A university provides an accused student with notice of the full scope of charges.
- ***Doe v. Brandeis University (2016)***: Basic fairness requires the university to provide an accused student with: (1) notice of charges, (2) the right to counsel, (3) the opportunity to confront the accused, (4) cross-examination of evidence or witness statements, and an effective appeal.
- ***Doe v. University of Southern California (2016)***: A university must provide an accused student with supplemental notice if the charges against the respondent change or expand.

Courts on Due Process and Fundamental Fairness

- ***Doe v. Claremont McKenna College (2018)***: When the respondent faces a severe penalty and the case turns on credibility, the process must provide for a hearing where the respondent may question, if even indirectly, the complainant.
- ***Doe v. Baum (2018)***: When credibility is at issue, the Due Process Clause mandates that a university provide accused students a hearing with the opportunity to conduct cross-examination.
- ***Doe v. Allee (2019)***: Fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing before a neutral adjudicator with the power to find facts and make credibility assessments independently.
- ***Doe v. Rhodes College (2019)***: An accused student must be afforded the opportunity to question the complainant and review all relevant evidence prior to the hearing.

Courts on Due Process and Fundamental Fairness

- *Doe v. Purdue University (2019)*: Investigation report must be provided to the parties prior to the hearing and must include summaries of both inculpatory and exculpatory evidence.
- *Boermeester v. Carry (2020)*: In a DV case, the state court ruled, “...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing.”
- *Doe v. Univ. of the Sciences (2020)*: Notions of fairness include providing the accused with some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge the evidence.



Texas State Updates

- **HB 1735**: Policy components, formalized process, prevention programming, training requirements, MOU's with agencies, confidentiality, civil penalties for non-compliance
- **SB 212**: Mandatory Reporting Obligations for Employees, reporting statistics to Chief Officer and Governing Body, confidentiality, criminal sanctions for failure to report to TIX officer
- **HB 449**: Transcript notation - the student is ineligible to reenroll in the institution for a reason other than an academic or financial reason.”

Framing Principles of 2020 Regulations

1. A University's treatment of a CP or RP in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX.
2. A University with actual knowledge of sexual harassment in a University educational program or activity in the U.S., must respond promptly in a manner that is not deliberately indifferent.
3. A University's response must treat CP's and RP's equitably by offering supportive measures and follow a grievance process before the imposition of sanctions against a RP.
4. A University is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of known circumstances.
5. If found that University discriminated against persons on basis of sex in educational program or activity, University must take remedial action.

*CP = Complainant

RP = Respondent

Grievance Process Basic Requirements

- Treat parties equitably
- Presumption of non-responsibility
- Reasonably prompt time frames with extensions for good cause
- Practitioners trained and free from conflict of interest/bias
- Uniform standard of evidence
- Restricted use of privileged information
- Objective evaluation of all relevant evidence
- Credibility determinations not based on person's status
- Range of supportive measures, remedies, and sanctions
- Remedies only following a finding of responsibility
- Sanctions only following the grievance process
- Designated appeal grounds

Two Key Provisions

- 1. Offer supportive measures upon actual knowledge.**
- 2. Pursue investigation and adjudication in response to a formal complaint.**

Interim Measures and/or Supportive Measures

- Interim measures provided in writing
- Support/advocacy/intake functions are separate from investigative/adjudicative functions.
- Options for, available assistance in, and how to request changes to:
 - Academic
 - Living
 - Extracurricular
 - Transportation
 - Working
 - Protective Measures
- If requested by the Complainant and if reasonably available
- Regardless of whether the Complainant chooses to file a formal report with the University or law enforcement.

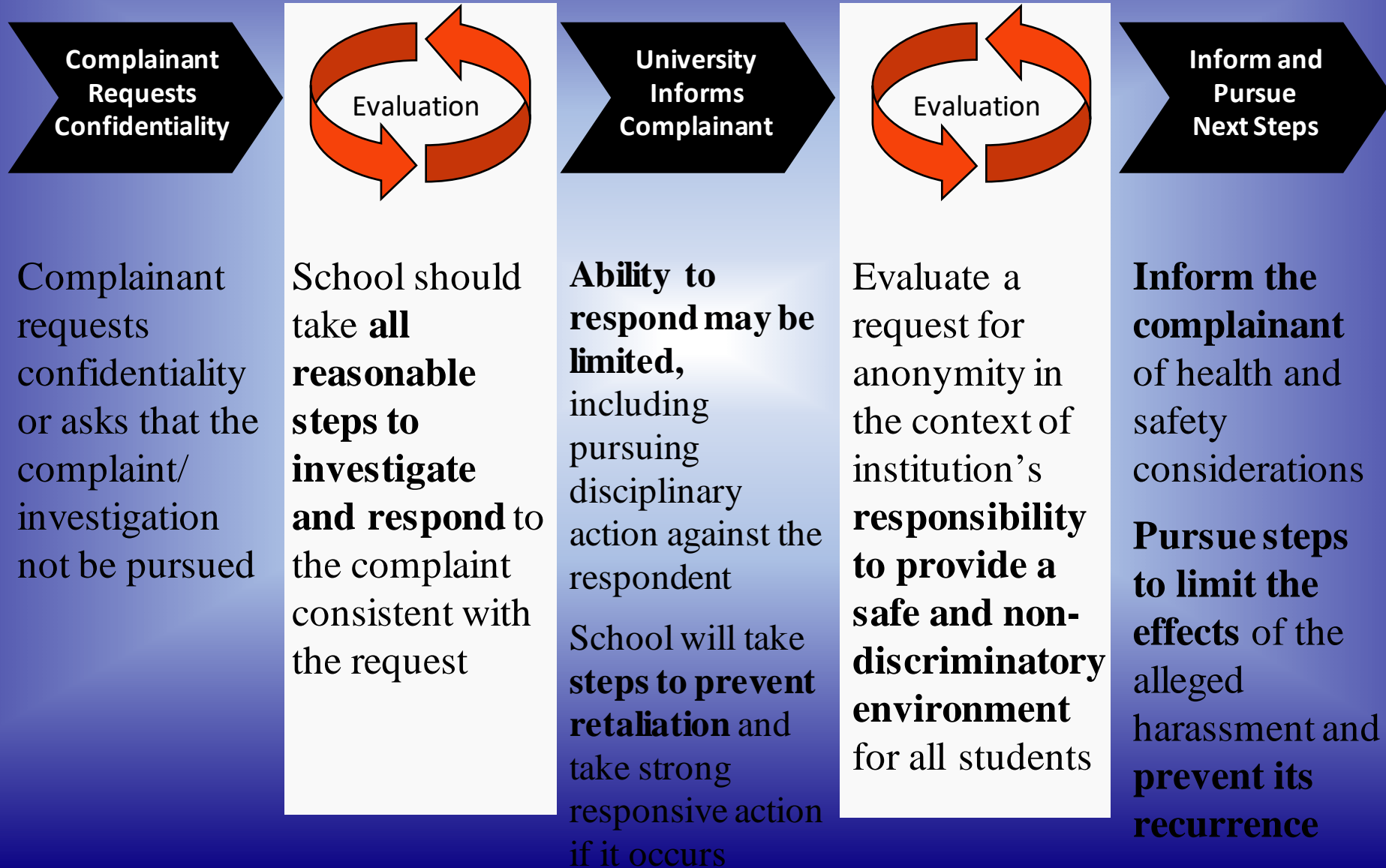
*Supportive measures and assistance beyond interim measures may be provided to both parties. These are non-punitive and non-disciplinary individualized services. These are meant to preserve each party's access to education pending the outcome of an investigation.



TIXC Determines Jurisdiction

- As long as one of the parties is an ETBU student, faculty, or staff, the Title IX Coordinator can provide reasonable assistance and possible opportunity of process.
- Jurisdiction to investigate.
Example: Complainant is an ETBU student; Respondent is not – no jurisdiction
- Complainant is offered support when affiliated with the University regardless of whether formal process occurs.
- Protections potentially apply to: faculty, staff, students, visitors.
- Assess location of incident and whether tied to ETBU program/activity (Title IX vs. Non-Title IX prohibited conduct) to determine appropriate process options.

Navigating the Confidentiality Conundrum



Balance Confidentiality With Community Safety

When weighing a student's request for confidentiality that could preclude a **meaningful** investigation or potential discipline of the respondent, a school should consider a range of factors:

- Seriousness
- Weapon
- Threats to repeat
- Complainant's age
- Other harassment complaints
- One or more prior sexual assaults committed by respondent
- Pattern of perpetration (e.g., via illicit use of drugs or alcohol, at a given location, or by a particular group)
- History of arrests or records indicating a history of violence
- Multiple respondents
- Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence)

Note: The alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under FERPA is another consideration that the school must balance.

Procedural Options Offered

- **Adaptable Resolution – informal or restorative options for resolving reports**
- **Disciplinary Resolution – involves an investigation and adjudication (hearing protocols differ if the prohibited conduct would be Title IX vs. non-Title IX)**
 1. **Title IX Sexual Harassment matters**
 2. **Non – Title IX Misconduct matters**

Understanding Title IX Sexual Harassment

- An Employee conditions the provision of an aid, a benefit, or a service on another Employee's or a Student's participation in unwelcome sexual conduct (i.e., Quid Pro Quo sexual harassment); or
- A Student, Employee, or Third Party (to the extent applicable) engages in unwelcome conduct on the basis of sex that would be determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies another person equal access to the University's programs or activities; or
- A Student, Employee, or Third Party engages in Sexual Assault, Domestic Violence, Dating Violence, or Sexual and/or Gender-based Stalking as defined below; and
 - The alleged conduct was perpetrated against a person in the United States; and
 - The conduct took place within the University's programs and activities. Conduct takes place within the "University's programs and activities" when that conduct occurs:
 - in a location, at an event, or in a circumstance where the University exercises substantial control over both the respondent and the context in which the conduct occurs; or
 - in any building owned or controlled by a student organization recognized by the University. Events that occur off campus or in locations with no connection to the University are unlikely to be considered a University program or activity.

Informal or Adaptable Resolution

Steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence **without initiating formal action** against the respondent:

- Providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred
- Providing training and education materials for students and employees
- Changing and publicizing the school's policies on sexual violence
- Conducting climate surveys regarding sexual violence
- Putting a respondent on notice of allegations of harassing behavior

*Voluntary and remedies-based resolution option. All parties and TIXC must agree to adaptable resolution for this option to be used.

Investigative Process

- Receive a formal complaint
- Notice of Allegations to parties
- Investigation
- Evidence Review – review and response period
- Investigative Report – review and response period
- Pre-Hearing Meeting
- Hearing
- Decision Rendered and Sanctions, if appropriate
- Appeals

Process considerations

- Presumption of innocent for Respondent throughout the grievance process. A Respondent is provided a thorough, transparent, and equitable process under ETBU's Sexual and Interpersonal Misconduct Policy. No punishment if there is not a determination of responsibility.
- Preponderance of the evidence standard utilized (“more likely than not”).
- Parties may have an “advisor of choice” present at meetings throughout process if desired.
- Written notices and access to review evidence/reports.

Advisor of Choice

- Advisor Role through investigative process
- Advisor Role in Hearing

What is your role?

- Take initial reports?
- Support/advocacy/intake functions are separate from investigative/adjudicative functions?
- Adaptable Resolution Officer?
- Investigator?
- Hearing Panel Member/Decision Maker?
- Appeals Officer?

Whatever your role...

- **You must avoid conflicts of interest**
- **You must avoid bias**
- **You may not make a prejudgment of the facts at issue**
- **You need to have a presumption that the Respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.**

**Types of Prohibited
Conduct under the Sexual
and Interpersonal
Misconduct Policy**

Understanding Title IX Sexual Harassment

- An Employee conditions the provision of an aid, a benefit, or a service on another Employee's or a Student's participation in unwelcome sexual conduct (i.e., Quid Pro Quo sexual harassment); or
- A Student, Employee, or Third Party (to the extent applicable) engages in unwelcome conduct on the basis of sex that would be determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies another person equal access to the University's programs or activities; or
- A Student, Employee, or Third Party engages in Sexual Assault, Domestic Violence, Dating Violence, or Sexual and/or Gender-based Stalking as defined below; and
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 - in a location, at an event, or in a circumstance where the University exercises substantial control over both the respondent and the context in which the conduct occurs; or
 - in any building owned or controlled by a student organization recognized by the University. Events that occur off campus or in locations with no connection to the University are unlikely to be considered a University program or activity.

Scope of ETBU's educational programs or activities

- On campus – residence halls, other buildings owned by ETBU?
- Traveling for a school event such as sports
- Examples?

Conduct Covered Under ETBU's *Sexual and Interpersonal Misconduct Policy*

- **Title IX Sexual Harassment**

(Verbal, Physical, Electronic)

- Title IX Quid Pro Quo Sexual Harassment
- Title IX Severe, Pervasive and Objectively Offensive Sexual Harassment
- Title IX Sexual Assault
- Title IX Domestic Violence
- Title IX Dating Violence
- Title IX Stalking

- **Non-Title IX Misconduct**

- Non-Title IX Sexual Assault
- Non-Consensual Sexual Contact
- Sexual and Gender-Based Harassment
- Sexual Exploitation
- Domestic Violence
- Dating Violence
- Stalking
- Retaliation
- Complicity

TIX Sexual Harassment

Title IX Quid Pro Quo Sexual Harassment: is conduct on the basis of sex by which an employee of the University conditions the provision of an aid, benefit, or service of the University on a student's or employee's participation in unwelcome sexual conduct.

Title IX Severe, Pervasive and Objectively Offensive Sexual Harassment: is conduct on the basis of sex that constitutes unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a student or employee equal access to the University's education program or activity.

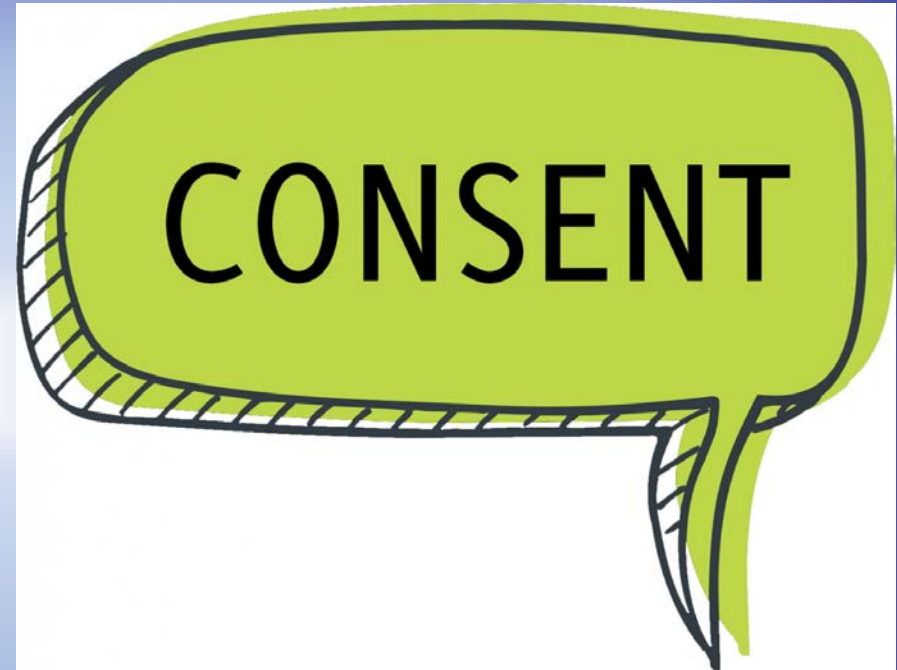
TIX Sexual Harassment (Continued)

Title IX Sexual Assault: Includes rape, fondling without consent, incest or statutory rape, defined as follows:

- Rape is the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral genital contact of another person without consent (as defined below).
- Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, without consent.
- Incest is sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- Statutory rape is sexual intercourse with a person who is under the statutory age of consent. Under Texas law, individuals younger than 17 years of age are legally incapable of giving consent to sexual penetration or contact by an adult (someone 18 years of age or older) who is three or more years older than the individual.

Consent

Consent is the voluntary, informed, and freely given agreement, through words and/or actions, to participate in mutually agreed-upon sexual acts. Consensual activity happens when each partner willingly and affirmatively chooses to participate.



Consent

- <https://www.youtube.com/watch?v=fGoWLWS4-kU>

Incapacitation

- Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring.
- An individual is incapacitated if they demonstrate that they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in an act.
- A state beyond drunkenness, intoxication, or being under the influence.

TIX Sexual Harassment (Cont.)

Title IX Domestic Violence: Conduct that constitutes a felony or misdemeanor crime of violence committed:

- By a current or former spouse or intimate partner of the complainant;
- By a person with whom the complainant shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- By a person similarly situated to a spouse of the complainant under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
- By any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

TIX Sexual Harassment (Cont.)

Title IX Dating Violence: conduct that constitutes violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant. The existence of such a relationship shall be determined based on the parties' statements and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition, dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.

Title IX Stalking: Conduct on the basis of sex that constitutes a course of conduct directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others or suffer substantial emotional distress.

Non-Title IX Misconduct covered under Sexual and Interpersonal Misconduct Policy

*Not Title IX either due to the nature of the conduct or because it did not reportedly occur within a program or activity of the University in the United States.

- *Non-Title IX Sexual Assault*: Same behavior as Title IX, but not in program/activity of University in the U.S.
- *Non-Title IX Non-Consensual Sexual Contact*: Any intentional touching of a person's breast(s), buttock(s), groin, genitals, or other intimate parts without consent. May be over or under clothing. May be RP touching CP, RP making CP touch RP/other person, or RP making CP touch own body.

Non-Title IX Misconduct covered under Sexual and Interpersonal Misconduct Policy (cont.)

Non-Title IX Sexual Harassment: Unwelcome sexual advance, request for sexual favors, and/or other unwelcome, verbal, or physical conduct of a sexual nature when one of the three conditions outlined below is present.

Non-Title IX Gender-Based Harassment: Based on gender, sexual orientation, gender identity, or gender expression, which include acts of aggression, intimidation, or hostility, whether verbal or non-verbal, graphic, physical, or otherwise, even if the acts do not involve contact of a sexual nature, when one of the three conditions outlined below is present.

- Submission to, or rejection of, such conduct is made implicitly or explicitly a term or condition of a person's instruction, academic standing, employment, or participation in any University program, activity, or benefit (not TIX Quid Pro Quo).
- Submission to, or rejection of, such conduct by an individual is used as a basis for evaluation in making academic or personnel decisions, in circumstances (not TIX Quid Pro Quo).
- Such conduct creates a hostile environment.

Non-Title IX Misconduct covered under Sexual and Interpersonal Misconduct Policy (cont.)

Non-Title IX Sexual Exploitation: Any act where one person violates the sexual privacy of another or takes unjust or abusive sexual advantage of another, but that does not fall within the definition of Title IX Sexual Harassment.

- Examples:
 - Filming an intimate encounter without the other person's knowledge and showing it to others.
 - Posting the nude pictures that your girlfriend or boyfriend sent only you, that they asked to keep private, to Snapchat or Instagram.
 - Surreptitiously observing another individual's nudity or sexual activity or allowing another to observe consensual sexual activity without the knowledge and consent of all parties involved.

Non-Title IX Misconduct covered under Sexual and Interpersonal Misconduct Policy (cont.)

Non-Title IX Domestic Violence

Non-Title IX Dating Violence

Non-Title IX Stalking

Complicity: Any act that knowingly aids, facilitates, promotes, or encourages the commission of Prohibited Conduct by another person.

Retaliation: intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations or this policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing regarding Prohibited Conduct.

Potential Amnesty



Reporting and Confidentiality

- All “responsible employees” must report to Title IX Coordinator suspected: sexual or gender-based harassment, sexual assault, sexual exploitation, stalking, intimate partner violence (dating and domestic), or retaliation regardless of where or when the alleged misconduct occurred.
 - Includes Student workers who are responsible employees such as Resident Assistants and Graduate Assistant Coaches
- Confidential Resources
 - Any employee who is a licensed medical, clinical, or mental-health professional when acting in that professional role in the provision of services to a patient.
 - Dean of Spiritual Life

END OF DAY 1